

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

October 30, 2000

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

LEHIGH PORTLAND CEMENT COMPANY :

:
:
:
:
:
:
:

Docket No. CENT 2000-473-M
A.C. No. 13-00095-05551

BEFORE: Jordan, Chairman; Riley, Verheggen, and Beatty, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On September 14, 2000, the Commission received from Lehigh Portland Cement Company (“Lehigh”) a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary of Labor does not oppose Lehigh’s motion for relief.

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

In the request, Lehigh, which is represented by counsel, asserts that a series of internal mail delivery problems delayed the receipt of the proposed penalty assessment by the appropriate personnel at Lehigh. Memorandum in Support of Mot. (“Memo.”) at 1. Specifically, Lehigh explains that its clerk/typist, who had been working at Lehigh for five months, received the proposed penalty assessment but failed to follow internal procedures for handling certified mail, including date-stamping the assessment and forwarding it to Lehigh personnel who are responsible

for health and safety at the plant. *Id.* at 2. It contends that the mail was sent through the regular mail distribution system, where it was delivered to the plant manager while he was out of the office. *Id.* at 2-3. Lehigh asserts that Gail Meyer, the Lehigh employee responsible for contesting proposed assessments, did not receive the proposed penalty until the plant manager returned to the plant on May 12, 2000. *Id.* at 3. It explains that, Ms. Meyer mailed the green card contesting three of the nine assessments on June 12, 2000 based on her mistaken belief that the penalty assessment had been received by Lehigh on May 11 or 12. *Id.* Lehigh contends that upon learning of the error, it corrected deficiencies in its internal mail distribution system. *Id.* Lehigh argues that its delay of five days in mailing the green card did not create undue delay or prejudice the Secretary, and notes that it was unrepresented at that stage. *Id.* at 5-6. It requests that the Commission reopen the final order. *Id.* at 6. Attached to its request is the declaration of Gail Meyer. Attach.

We have held that, in appropriate circumstances and pursuant to Rule 60(b), we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *See, e.g., Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Services, Inc.*, 17 FMSHRC 1529, 1530 (September 1995). In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See National Lime & Stone Co., Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997).

The record indicates that Lehigh intended to contest the proposed penalty assessment, but that it failed to do so in a timely manner due to internal mismanagement of its mail. The declaration attached to Lehigh's request appears to be sufficiently reliable and supports Lehigh's allegations. In the circumstances presented here, Lehigh's late filing of a hearing request may be considered inadvertence or mistake within the meaning of Rule 60(b)(1). *See Chantilly Crushed Stone, Inc.*, 22 FMSHRC 17, 18 (Jan. 2000) (reopening final order where operator attached sufficiently reliable documents to support its allegations that it failed to timely file hearing request due to inexplicable mail delays); *Martin Marietta Aggregates*, 22 FMSHRC ___, slip op. at 3, No. WEVA 2000-104-M (Oct. 11, 2000) (granting the operator's request to reopen where the operator alleged that its accounts payable department made a processing error when it inadvertently sent a hearing request along with payment for other penalties it did not intend to contest to MSHA's regional office).

Accordingly, in the interest of justice, we grant Lehigh's request for relief, reopen this penalty assessment that became a final order, and remand to the judge for further proceedings on the merits. The case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

Distribution

Dennis J. Morikawa, Esq.
Morgan, Lewis & Bockius, LLP
1701 Market Street
Philadelphia, PA 19103

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Chief Administrative Law Judge David Barbour
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006